Supreme Court, U. S.
FILED
JUL 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-1344

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

MICHAEL M.,
Petitioner,

vs.

THE SUPERIOR COURT OF SONOMA COUNTY,
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondents.

On Writ of Certiorari to
The Supreme Court of California

BRIEF OF THE PETITIONER

GREGORY F. JILKA
TERESA DE LA O
245 Southwest Blvd.
Rohnert Park, CA 94928
Telephone: (707) 795-9569
Attorneys for Petitioner

Dated: July 24, 1980

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

QUESTION PRESENTED

Whether the prosecution of petitioner, age 17, under California's statutory rape law (Penal Code §§ 261.5, 264) for engaging in sexual intercourse with a sixteen year old female violates petitioner's right to equal protection of the law as guaranteed under paragraph 1 of the Fourteenth Amendment of the United States Constitution.

SUBJECT INDEX

	Page
Question presented	i
Opinion below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement of the case	2
Summary of argument	3
Argument	5
Introduction	5
I	
California's statutory rape law reflects and perpetuates invidious sexual discrimination	7
II	
The statute arbitrarily holds the male criminally culpable even though the female may be older, more mature, or herself the sexual aggressor	12
III	
The statute does not serve important governmental interests nor is it substantially related to the achievement of any governmental interests	17
IV	
Prevention of teenage pregnancies is not the purpose of the statute	24
Conclusion	27

TABLE OF AUTHORITIES CITED

Cases

Page

Federal:

Cahan v. Mohammed (1979) 441 U.S. 380, 60 L.Ed.2d 297, 99 S.Ct. 1760 ..... 6, 15

Califano v. Goldfarb (1977) 430 U.S. 199, 51 L.Ed.2d 270, 97 S.Ct. 1021 ..... 6, 17

Califano v. Westcott (1979) 433 U.S. 76, 61 L.Ed.2d 382, ... S.Ct. 6

Carey v. Population Services International (1977) 431 U.S. 678, 52 L.Ed.2d 675, 97 S.Ct. 2010 20

Cleveland Board of Education v. LaFleur (1974) 414 U.S. 632, 39 L.Ed.2d 52, 94 S.Ct. 791 7

Craig v. Boren (1976) 429 U.S. 190, 50 L.Ed.2d 397, 97 S.Ct. 451 ..... 6, 17, 18

Frontiero v. Richardson (1973) 411 U.S. 677, 36 L.Ed.2d 583, 93 S.Ct. 1764 ..... 7, 10, 11

Kahn v. Shevin (1974) 416 U.S. 351, 40 L.Ed.2d 189, 94 S.Ct. 1734 7

McGowan v. Maryland (1961) 366 U.S. 420, 6 L.Ed. 2d 393, 81 S.Ct. 1101 24

Meloon v. Helgemoe (1st Cir., 1977) 564 F.2d 602, cert. den. 436 U.S. 950, 56 L.Ed.2d 793, 98 S.Ct. 2858 ..... 14, 27

Michael M. v. Superior Court (1979) 25 Cal.3d 608, 601 P.2d 572 ..... 1, 11, 13, 14, 19, 24, 25

Muller v. Oregon (1908) 208 U.S. 412, 52 L.Ed. 551, 28 S.Ct. 324 ..... 7, 10

Orr v. Orr (1979) 440 U.S. 268, 59 L.Ed.2d 306, 99 S.Ct. 1102 ..... 6, 12, 17

Reed v. Reed (1971) 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251 ..... 7, 17

Table of Authorities Cited

Cases

Page

Reitman v. Mulkey (1971) 387 U.S. 369, 18 L.Ed.2d 830, 87 S.Ct. 1627 24

Stanley v. Illinois (1972) 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 7

Stanton v. Stanton (1975) 421 U.S. 7, 43 L.Ed.2d 688, 95 S.Ct. 1373 ..... 6, 11

U.S. v. Hicks (9th Cir., 4/16/80), ... F.2d ....., 27 Crim.L.Rptr. 2176 (Case No. 78-2534) 14, 18

Weinberger v. Weisenfield (1975) 420 U.S. 636, 43 L.Ed.2d 514, 95 S.Ct. 1225 6

Wengler v. Druggists Mutual Ins. Co. (1980) ..... U.S. ..... 64 L.Ed.2d 107, ... S.Ct. 6, 17

State:

Golden v. Commonwealth (Ky. 1942) 158 S.W.2d 967, 289 Ky. 379 8

People v. Caldwell (1967) 255 Cal.App.2d 229 ..... 25, 26

People v. Courtney (1960) 180 Cal.App.2d 61 25

People v. Derbert (1903) 138 Cal. 467, 71 P. 564 13

People v. Edwards (1912) 163 Cal. 752, 127 P. 58 25

People v. Hernandez (1964) 61 Cal.2d 529, 393 P.2d 673 ..... 10, 15, 25

People v. Johns (1959) 173 Cal.App.2d 38, 343 P.2d 92 13

People v. Lourintz (1896) 114 Cal. 628, 46 P. 613 ..... 9, 25

People v. Mackey (1975) 46 Cal.App.3d 755, cert. den. 423 U.S. 951 ..... 10, 26

People v. Ratz (1896) 115 Cal. 132, 46 P. 915 25

People v. Totman (1901) 135 Cal. 133, 67 P. 51 13

People v. Verdegreen (1895) 106 Cal. 211, 39 P. 607 ..... 9, 25

Table of Authorities Cited

Statutes

Page

Alabama:

Ala. Code, tit. 14, section 339 21

Alaska:

Alaska Stat.:

section 11.15.120 21

section 11.41.410(a)(3) 19

section 11.41.410(a)(4) 19

Arizona:

Ariz. Rev. Stat. Ann. section 13-1405 .....19, 21, 22

Arkansas:

Ark. Stat.:

section 41-1803 21

section 41-1803(1)(c) 19

section 41-1804 21

California:

Civil Code:

section 25 22

section 34.5 22

Penal Code:

section 18 ..... 2, 6

section 261.1 25

section 261.5 .....passim

section 264 .....i, 2, 6

Welfare and Institutions Code sections 200 et seq. 22

Cal. Stats. 1970, ch. 1301, section 2, p. 2406 25

Colorado:

Colo. Rev. Stat.:

section 18-3-403 21

section 18-3-403(1)(e) 19

Table of Authorities Cited

Statutes

Page

Connecticut:
Conn. Gen. Stat. Ann.:
section 53a-71 21
section 53a-71(a)(1) 19

Delaware:
Del. Code, tit. 11, sections 761-762(a) 21

District of Columbia:
D.C. code section 22-2801 21

Florida:
Fla. Stat.:
section 794.011 22
section 794.05 ..... 19, 22

Georgia:
Ga. Code section 26-2018 21

Hawaii:
Hawaii Rev. Stat.:
section 707-730(1)(b) 19
section 707-731(1)(b) 19, 21

Idaho:
Idaho Code section 18-6101(1) 21

Illinois:
Ill. Ann. Stat. ch. 38:
section 11-5 ..... 19, 21, 22
section 11-6 ..... 19, 21, 22

Indiana:
Ind. Code Ann. section 35-42-4-3 ..... 19, 20

Table of Authorities Cited

Statutes

Page

Iowa:

Iowa Code Ann.:

section 709.3 ..... 19, 21

section 709.4 ..... 19, 21

Kansas:

Kan. Stat. Ann. section 21-3503 ..... 19, 21

Kentucky:

Ky. Rev. Stat.:

section 510.040 ..... 19, 21

section 510.050 ..... 19, 21

Louisiana:

La. Rev. Stat.:

section 14.42 21

section 14.80 21

Maine:

Me. Rev. Stat. Ann., tit. 17A:

section 252 ..... 19, 20, 21

section 254 ..... 19, 20, 21

Maryland:

Md. Ann. Code, art. 27:

section 463 ..... 20, 21

section 464A 20, 21

Massachusetts:

Mass. Ann. Laws, ch. 265, section 23 ..... 20, 21

Michigan:

Mich. Stat. Ann.:

section 28.788(2)(1)(a) 20, 21

section 28.788(4)(1)(a) 20, 21

Table of Authorities Cited

Statutes

Page

Minnesota:
Minn. Stat. Ann. sections 609.342 - 609-345 .....20, 21

Mississippi:
Miss. Code Ann.:
section 97-3-65 22
section 97-3-67 22

Missouri:
Mo. Ann. Stat. section 559.260 .....20, 21

Montana:
Mont. Rev. Code Ann. sections 94-5-501 - 94-5-503 ..20, 21

Nebraska:
Neb. Rev. Stat. section 28-408.03(1)(c) 20, 21

Nevada:
Nev. Rev. Stat. section 200.365 21

New Hampshire:
N.H. Rev. Stat. Ann. sections 632-A2 - 632-A3 .....20, 21

New Jersey:
N.J. Rev. Stat. section 2a:138-1 .....20, 21

New Mexico:
N.M. Stat. Ann.:
section 40A-9-21 .....20, 21
section 40A-9-23 21

New York:
N.Y. Penal Law section 130.25 21

North Carolina:
N.C. Gen. Stat.:
section 14-27-2(a)(2) 21
section 14.28-2(a)(2) 20

TABLE OF AUTHORITIES CITED

STATUTES

Page

North Dakota:

N.D. Cent. Code:

section 12.1-20-03 20

section 12.1-20-05 20

section 12.1-20-07 20

Ohio:

Ohio Rev. Code Ann.:

section 2907.02 ..... 20, 21

section 2907.04 ..... 20, 21

Oklahoma:

37 Okla. Stat.:

section 163.15 6

section 163.20 6

section 241 6

Oregon:

Or. Rev. Stat.:

section 163.315 21

section 163.345 21

section 163.415 21

section 163.435 21

Pennsylvania:

Pa. Cons. Stat. Ann., tit. 18, section 3122 ..... 20, 21

Rhode Island:

R.I. Gen. Laws section 11-37-2 ..... 20, 21

South Carolina:

S.C. Code section 16-3-655 ..... 20, 21

South Dakota:

S.D. Comp. Laws Ann. section 22-22-1 ..... 20, 21

Table of Authorities Cited

Statutes

Page

Tennessee:
- Tenn. Code Ann.:
  - section 39-3703(3) 20, 21
  - section 39-3705(4) 20, 21

Texas:
- Tex. Penal Code section 21.09 21

Utah:
- Utah Code Ann.:
  - section 76-5-401 ..... 20, 21
  - section 76-5-402(2) 20, 21

Vermont:
- Vt. Stat. Ann. tit. 13:
  - section 1352 21
  - section 3252 20

Virginia:
- Va. Code:
  - section 18.2-61 21
  - section 18.2-63 21

Washington:
- Wash. Rev. Code:
  - section 9A.44.070 ..... 20, 21
  - section 9A.44.078 ..... 20, 21
  - section 9A.44.079 ..... 20, 21

West Virginia:
- W. Va. Code:
  - section 61-8B-3(3) 20, 21
  - section 61-8B-5(a)(2) 20, 21

Wisconsin:
- Wis. Stat. Ann. section 940.225(1) 20

TABLE OF AUTHORITIES CITED

STATUTES

Page

Wyoming:
Wyo. Stat.:
section 6-63.3 ..... 20, 21
section 6-63.4 ..... 20, 21
28 U.S.C. section 1257(3) 1

Constitution

United States Constitution, Fourteenth Amendment, section 1 ..... i, 2

Other Authorities

Cal. Dept. of Justice, Bureau of Criminal Statistics, Division of Law Enforcement, Criminal Justice Profile (1978), p. 6 22

Comment, The Constitutionality of Statutory Rape Laws, (1980) 27 UCLA Law Rev. 5, 8, 12, 25

Formichi, California Style Manual, (2nd Ed.) §§ 213, 214, 245, 246 2

Population Projection for California Counties 1975-2020 with Age/Sex Detail to 2000, Cal. Dept. of Finance, Sacramento (1977) 23

Sorensen, Adolescent Sexuality in Contemporary America (World Publishing, 1973), p. 122 23

Stern and Gressman, Supreme Court Practice (5th Ed.) § 6.19(6), p. 440 2

Strong; Sex, Character, and Reform in Society 1830-1920 (1972, University Microfilms) p. 18 8

No. 79-1344

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

MICHAEL M.,
Petitioner,

VS.

THE SUPERIOR COURT OF SONOMA COUNTY,
THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondents.

On Writ of Certiorari to
The Supreme Court of California

BRIEF OF THE PETITIONER

OPINION BELOW

The opinion of the Supreme Court of California is reported at 25 Cal.3d 608 and at 601 P.2d 572.

JURISDICTION

The decision of the Supreme Court of California was entered on November 5, 1979 (Pet. W. Cert. p. A-1). A Petition for Rehearing was denied on December 5, 1979 (Pet. W. Cert. p. A-25). The Petition for Writ of Certiorari was timely filed on March 1, 1980 and was granted on June 9, 1980. This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves California Penal Code Section 261.5, which defines the offense of "unlawful intercourse," and California Penal Code Sections 264 and 18 which provide for the punishment for violation of Section 261.5. This case also involves Section 1 of the Fourteenth Amendment of the United States Constitution. Each of these provisions is set forth at length in the Appendix to this brief.

STATEMENT OF THE CASE

On September 6, 1978, a Petition for Writ of Prohibition was filed in the California Court of Appeal, First Appellate District (A. 2-6). The petition alleged that the petitioner, Michael M.,[1] was facing an impending criminal trial in Sonoma County Superior Court for a single violation of California Penal Code Section 261.5 (A. 4, 7-8). The petition further alleged that Michael had sought dismissal of the charge against him on the ground that Penal Code Section 261.5 violates the federal and state constitutional equal protection clauses (A. 4). This motion was denied by the trial court on August 22, 1978 (A. 4). Michael's petition requested that Superior Court be enjoined from further prosecution (A. 5-6).

---

[1]This name is a pseudonym used pursuant to the policy of the California appellate courts "not to disclose the identity of minors" in juvenile proceedings. See Formichi, California Style Manual, (2nd Ed.) §§ 213, 214, 245, 246. The use of this pseudonym has been continued in light of this court's apparent policy allowing the use of pseudonyms where used below. See Stern and Gressman. Supreme Court Practice (5th Ed.) § 6.19(6), p. 440.

The Court of Appeal denied Michael's Petition for Writ of Mandate on September 14, 1978, without comment (A. 9).

At Michael's request, the Supreme Court of California transferred that petition to that court on October 12, 1978 (A. 10), and issued an Alternative Writ of Prohibition commanding the Superior Court to show cause why the charge should not be dismissed (A. 11-12). The Real Party in Interest filed a return to the Alternative Writ on November 3, 1978, which admitted each of the factual allegations of the petition (A. 13-15).

On November 5, 1979, the Supreme Court of California denied the Writ of Mandate by a narrow majority (Pet. W. Cert. p. A-1). Michael's Petition for Rehearing was filed on November 19, 1979, and was denied on December 5, 1979 (Pet. W. Cert. p. A-25).

The Petition for Writ of Certiorari was filed in this court on March 1, 1980 and was granted on June 9, 1980.

SUMMARY OF ARGUMENT

Michael, the Petitioner, is charged with the crime of "unlawful intercourse," California's version of statutory rape, for engaging in sexual intercourse with Sharon, a 16 year old female. Michael, who was 17 years old at the time of the alleged offense, faces a maximum sentence of three years in prison while Sharon cannot violate the gender based statute. The contrast of imprisonment for males for conduct which females can engage in with impunity is perhaps the greatest disparity in the treatment of the sexes ever challenged before this court.

Women have been traditionally stereotyped as helpless and dependent. Statutory rape laws such as California's reflect and perpetuate the stereotype by presuming that young women are too naive to consent to sexual intercourse. This court has recognized that discrimination based upon traditional sex roles is inconsistent with women's attainment of equality of right and opportunity. California's statutory rape law should therefore be regarded with disfavor because it perpetuates and reinforces the customary roles of the sexes.

The statute's classification of males and females is arbitrary. The trait of maleness is flatly equated with culpability irrespective of whether the female is older or the aggressor. Sex is therefore used as an absolute proxy for fault. Since the statute's irrebuttable presumption of male culpability does not comport with reality, the criminal sanctions which California assesses only against males are arbitrary.

California cannot meet its burden of demonstrating that the alleged purpose of the statute is substantially furthered by its gender based classifications. The only argued purpose for the statute, the prevention of teenage pregnancies, cannot justify the disparity in the treatment of the sexes. The statute operates unhesitatingly even when pregnancy is physiologically impossible or when reliable birth control devices are used. Numerous acts are therefore prohibited which cannot result in pregnancy. The need for California to employ a gender based law is dubious in light of the adoption of gender neutral "statutory rape" laws by more than seventy percent of the states. The Cali-

fornia statute is ill suited as a deterrent because the offense is not ordinarily subject to detection. Arrests for violation of the statute are so infrequent that the chances of apprehension are infinitesimal. The statute therefore fails to serve any important governmental interest and is wholly unrelated to the achievement of any legitimate governmental goal.

The record is devoid of any evidence that a concern for teenage pregnancy is the actual purpose of the statute. Case law demonstrates that the avowed purpose of the statute is the preservation of the virtue of young girls. California's pregnancy prevention argument is a hindsight catchall rationalization futilely used to justify a vestige of bygone attitudes about the proper roles of the sexes.

ARGUMENT

INTRODUCTION

The Petitioner, Michael, comes before this court accused but untried of the offense of "unlawful sexual intercourse" (formerly "statutory rape"[2]) in violation of Section 261.5 of the California Penal Code (hereinafter referred to as "the statute"). The record fairly discloses that Michael was 17½ years of age at the time of the alleged offense (A. 4). The alleged victim, Sharon, age 16½, was only one year and 18 days younger than Michael (A. 4).

---

[2]Statutory rape is traditionally defined as sexual intercourse with a female under a certain age. See Comment, *The Constitutionality of Statutory Rape Laws*, (1980) 27 UCLA Law Rev. ..., hereinafter *"Statutory Rape Laws."* (At the time this brief was filed, Issue 3 of 27 UCLA Law Review was in production. References to *Statutory Rape Laws* will therefore be to the manuscript page number.)

If Michael is found to violate the statute, he faces a maximum punishment of three years in the state prison. Cal. Penal Code §§ 264, 18 (Appendix, *infra* p. A-1, 2). Males are therefore subject to severe loss of freedom under the statute while no infirmity whatsoever attaches to females.

This disparity in the treatment of the sexes is perhaps the greatest ever examined by this court. Other instances of discrimination reviewed which did not result in a loss of freedom involved: a presumption of widow's dependence for workers compensation purposes (*Wengler v. Druggists Mutual Ins. Co.* (1980) ..... U.S. ..... 64 L.Ed.2d 107, ... S.Ct.....); the availability of AFDC benefits for families with unemployed mothers (*Califano v. Westcott* (1979) 433 U.S. 76, 61 L.Ed.2d 382, ... S.Ct. .....); the right of an unwed father to veto adoption (*Cahan v. Mohammed* (1979) 441 U.S. 380, 60 L.Ed.2d 297, 99 S.Ct. 1760); a statute providing for alimony payments to wives only (*Orr v. Orr* (1979) 440 U.S. 268, 59 L.Ed.2d 306, 99 S.Ct. 1102); a presumption of dependency for widows for Social Security benefits (*Califano v. Goldfarb* (1977) 430 U.S. 199, 51 L.Ed.2d 270, 97 S.Ct. 1021); the right to buy 3.2% beer[3] (*Craig v. Boren* (1976) 429 U.S. 190, 50 L.Ed.2d 397, 97 S.Ct. 451); Utah's age of majority (*Stanton v. Stanton* (1975) 421 U.S. 7, 43 L.Ed.2d 688, 95 S.Ct. 1373; Social Security survivors benefits (*Weinberger v. Weisenfield* (1975) 420 U.S. 636, 43 L.Ed.2d 514, 95 S.Ct. 1225);

---

[3]In *Craig v. Boren*, misdemeanor criminal penalties were applied to the seller, but not to the minor male acquiring 3.2% beer. See 37 Okla. Stat. §§ 163.15, 163.20, 241.

a $500 property tax exemption for widows (*Kahn v. Shevin* (1974) 416 U.S. 351, 40 L.Ed.2d 189, 94 S.Ct. 1734); a school board's mandatory maternity leave policy (*Cleveland Board of Education v. LaFleur* (1974) 414 U.S. 632, 651, 39 L.Ed.2d 52, 94 S.Ct. 791 (Powell, J., concurring)); uniformed services dependent allotments (*Frontiero v. Richardson* (1973) 411 U.S. 677, 36 L.Ed.2d 583, 93 S.Ct. 1764); the right of unwed fathers to obtain custody of children (*Stanley v. Illinois* (1972) 405 U.S. 645, 31 L.Ed. 2d 551, 92 S.Ct. 1208); and a preference in appointment of probate administrators (*Reed v. Reed* (1971) 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251). Although the disparities in the treatment of the sexes presented in the foregoing cases are each of great importance, the deprivation of the liberty of males for as much as three years found here is a far harsher contrast than is afforded by the previous sex discrimination cases heard by this court.

I

CALIFORNIA'S STATUTORY RAPE LAW REFLECTS AND PERPETUATES INVIDIOUS SEXUAL DISCRIMINATION

Sex discrimination has been predominant throughout the history of this nation. The female has been traditionally viewed as dependent on the male for protection and means and therefore has been considered inferior to males as a class. See, e.g., *Muller v. Oregon* (1908) 208 U.S. 412, 421-422, 52 L.Ed. 551, 556, 28 S.Ct. 324. Conversely, males are

depicted as passionate aggressors[4] who may, if left unchecked, violate their fiduciary duty to protect and provide for women.

The traditional view of the roles of the sexes has formed the basis for the much criticized "double standard." "The fact that female chastity has been valued much more highly than male chastity reflects a set of attitudes known as the sexual double standard. Reduced to its essence, under the sexual double standard premarital sexual activity by the male is considered normal while the same activity by the female is not." *Statutory Rape Laws, supra* n. 2, [Manuscript page 10].

Modern statutory rape laws embrace and perpetuate the traditional stereotypic view of the sexes. Females as old as eighteen are conclusively presumed to be helpless paragons of virtue and incapable of consent. For example:

> [Kentucky's statutory rape law] was designed to protect children and idiots deemed to be incapable in law of consenting. The reason is that the victim is without capacity and discretion to have a proper conception of the character of the offense being committed against her person, or to comprehend its consequences fully, or perhaps to possess strength of will to resist the influence and importunities of the ravisher. That is actually so of an idiot and presumptively so of a child.
>
> *Golden v. Commonwealth* (Ky. 1942) 158 S.W.2d 967, 969; 289 Ky. 379

---

[4]"The pure woman appears to have become the dominant ideal type in America by 1820. By defining herself as pure while men, nevertheless, remained passionate, a hostility was set up between the sexes which was to have overwhelming psychological and social ramifications in America: man as aggressor, woman as victim." Strong; Sex, Character, and Reform in Society 1830-1920 (1972, University Microfilms) p. 18.

Although the presumption of incapacity may well be valid when applied to a young child, such a presumption is wholly inappropriate when applied to sexually mature teenagers who engage in sexual exploits with their peers.

The California statute is no exception to the pattern of stereotypic thinking which traditionally pervades statutory rape laws. In 1895, the California Supreme Court first articulated the statute's concern for the virtue of womanhood:

> The obvious purpose of [the statute] is the protection of society by protecting from violation the virtue of young and unsophisticated girls. . . . It is the insidious approach and vile tampering with their persons that primarily undermines the virtue of young girls, and eventually destroys it; and the prevention of this, as much as the principal act, must undoubtedly have been the intention of the legislature. . . .
>
> *People v. Verdegreen* (1895) 106 Cal. 211, 214, 39 P. 607, 608-609.

See also *People v. Lourintz* (1896) 114 Cal. 628, 630, 46 P. 613. Sixty-nine years later, the California Supreme Court again avowed the statute's solitary purpose:

> [I]n one sense, the lack of consent of the female is not an element of the offense. In a broader sense, however, the lack of consent is deemed to remain an element but the law makes a conclusive presumption of the lack thereof because she is presumed too innnocent and naive to understand the implications and nature of her act. [Citations omitted.] The law's concern with her capacity or lack thereof to so understand is explained in part by a popular conception of the social, moral and personal values which are preserved by the abstinence from sexual indulgence on the part of a

> young woman. An unwise disposition of her sexual favor is deemed to do harm both to herself and the social mores by which the community's conduct patterns are established. Hence the law of statutory rape intervenes in an effort to avoid such a disposition.
>
> *People v. Hernandez* (1964) 61 Cal.2d 529, 531, 393 P.2d 673, 674

The court's depiction of the female as "innocent and naive" is a classical characterization of a now inveterate view of the women's role. The expressed concern for the virtue of young women, but not young men, is a simple restatement of the invidious double standard.

In 1975, the California Fourth District Court of Appeal dismissed a constitutional attack on the statute with a reference to the *male* stereotype. "It would be unrealistic to base a conclusion as to the reasonableness of the statute's classification of the protected class upon a belief that girls of the age of the victim are no more likely than boys of the same age to be the objects of the desires and designs of older people of the opposite sex who are on the prowl." *People v. Mackey* (1975) 46 Cal.App.3d 755, 760, cert. den. 423 U.S. 951. The court's characterization of adult males as possessing "desires and designs" is the timeworn image of the passionate, aggressive male.[5]

The perpetuation of traditional sexual stereotypes has been recognized by this court as violative of constitutional equal protection guarantees. In *Frontiero v. Richardson,*

---

[5]Compare *Muller v. Oregon, supra,* (1908) 208 U.S. 412, 422, 52 L.Ed. 551, 556, 28 S.Ct. 324, stating: ". . . [H]er physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man."

supra, (1973) 411 U.S. 677, 684, 36 L.Ed.2d 583, 590, 93 S.Ct. 1764, the court acknowledged the negative impact of sex discrimination on this country. "There can be no doubt that our nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." (Fn. omitted.) *Ibid.* As a consequence of traditional sex discrimination, women have been limited in attaining positions of responsibility outside of the home. *Stanton v. Stanton* (1975), *supra,* 421 U.S. 7, 14-15, 43 L.Ed.2d 688, 695, 95 S.Ct. 1373.

The classification scheme reflected in the statute has the effect of reinforcing stereotypes about the proper place of men and women in society. Females who are physically and sexually mature are deemed incapable of making intelligent decisions. "*Because she is a woman* she is deemed inherently less capable of knowing the facts, of controlling her emotions, of weighing the risks and benefits, and of making intelligent choices—in short, she is less responsible for her actions—than her male counterpart." (Original italics.) *Michael M., supra,* 25 Cal.3d 608, 624 [Pet. W. Cert. p. A-22, 23] (Mosk, J., dissenting). By contrast, males are presumed to be the sexual aggressor and therefore absolutely criminally responsible for *every* act of intercourse with females under the age of 18. The result is a highly invidious double standard which is harmful to each of the sexes:

> The sexual double standard perpetuates stereotypes that are unfavorable to both sexes. Statutory rape laws embody these stereotypes by assuming that males will aggressively corrupt and exploit innocent young

> females unless deterred by criminal penalties. A complementary assumption is that females are in need of special legal protection because of their passivity, ignorance, and vulnerability to harmful effects of sexual intercourse, including the informal sanctions. Furthermore, by presuming that underage females, unlike underage males, are incapable of understanding the nature and consequences of sexual intercourse, statutory rape laws embody a stereotype of girls as intellectually deficient and incompetent in a way in which boys are not. [Fns. omitted.]
>
> *Statutory Rape Laws, supra* n.2 [Manuscript p. 11]

The discrimination which the statute generates stigmatizes all women, not just those under age. "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." *Orr v. Orr* (1979), *supra,* 440 U.S. 268, 283, 59 L.Ed.2d 306, 321, 99 S.Ct. 1102. As long as gender based statutory rape laws exist in this country, at least one poignant remnant of the invidious sexual double standard of the past will impede the attempts of women to attain equality in law and responsibility for their own destinies.

II

THE STATUTE ARBITRARILY HOLDS THE MALE CRIMINALLY CULPABLE EVEN THOUGH THE FEMALE MAY BE OLDER, MORE MATURE, OR HERSELF THE SEXUAL AGGRESSOR

California Penal Code Section 261.5 defines "unlawful sexual intercourse" as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where

the female is under the age of 18 years." Force is not an element of the crime, and consent of the minor female is not a defense. *People v. Johns* (1959) 173 Cal.App.2d 38, 46-47, 343 P.2d 92, 98, *People v. Totman* (1901) 135 Cal. 133, 135, 67 P. 51, 52. The male faces strict liability for transgression of the statute even where "the girl may be the older and more aggressive of the two, and the real seducer . . ." *People v. Derbert* (1903) 138 Cal. 467, 469, 71 P. at 564.

The California Supreme Court has unanimously agreed that the statute creates discriminatory classifications based upon sex.[6] Mr. Justice Richardson writing for the majority below stated "[t]here can be no doubt that Section 261.5 discriminates on the basis of sex because only females may be victims, and only males may violate the section." *Michael M., supra*, 25 Cal.3d 608, 611 [Pet. W. Cert. p. A-2]. The minority agreed stating "[t]he majority concede, as they must, that the statute discriminates on the basis of sex because it punishes males who engage in consensual sexual intercourse with females under the age of 18, but not females who perform the same act with males under the age of 18." *Ibid.* at 616, (Mosk, J., dissenting) [Pet. W. Cert. p. A-10].

The only asserted purpose for the statute was the prevention of teenage pregnancies. "[T]his obviously discriminatory classification scheme is readily justified by an important state interest. . . . [T]he law herein challenged is supported not by mere social convention but by the im-

---

[6]By implication, the court has found that the sexes are similarly situated for the purposes of the statute.

mutable physiological fact that it is the female exclusively who can become pregnant." *Michael M., supra*, 25 Cal.3d 608, 611. [Pet. W. Cert. p. A-2, 3]. No other justification for the statute was argued.[7]

The statute's flat presumption of male culpability can not be justified by any trait which is unique to that sex. The operation of the statute is therefore arbitrary and unable to withstand even the lowest level of equal protection scrutiny.

The classifications of the statute use the trait of maleness as a proxy for criminal and moral culpability. In all instances of sexual intercourse, the male is presumed to be the instigator, or at least the only party capable of preventing the act. "The Legislature is well within its power in imposing criminal sanctions against males, alone, because they are the *only* persons who may physiologically cause the result which the law properly seeks to avoid." (Original italics.) *Michael M., supra*, 612, [Pet. W. Cert. p. A-5]. "Maleness" and pregnancy are thereby equated as if the female was only a passive participant.

The court's assumption that males "are the *only* persons" who cause pregnancy ignores that the female may be the instigator or that the decision to engage in sexual conduct may be mutual. "[F]or purposes of equal protection analysis, it probably should be assumed that in the class of cases in which the parties are not equally responsible, the

---

[7]Compare *Meloon v. Helgemoe* (1st Cir., 1977) 564 F.2d 602, 605-608, cert. den. 436 U.S. 950, 56 L.Ed.2d 793, 98 S.Ct. 2858; *U.S. v. Hicks* (9th Cir., 4/16/80), ... F.2d ..., 27 Crim.L.Rptr. 2176 (Case No. 78-2534).

woman has been the aggressor about as often as the man." *Caban v. Mohammed* (1979) 441 U.S. 380, 404, 60 L.Ed.2d 297, 315, 99 S.Ct. 1760, (n.8) (Stevens, J., dissenting). The California court's assumption of exclusive male causation is incompatible with the fact that sexual intercourse is ordinarily a mutual act, and completely overlooks all assertive female conduct.

California females under the age of 18 may well be more emotionally and physically mature than their male counterparts and therefore could be in a better position to assume the responsibility for sexual activity. As the California Supreme Court itself stated in 1964:

> The assumption that age alone will bring an understanding of the sexual act to a young woman is of doubtful validity. Both learning from the cultural group to which she is a member and her actual sexual experiences will determine her level of comprehension. The sexually experienced 15-year-old may be far more acutely aware of the implications of sexual intercourse than her sheltered cousin who is beyond the age of consent. A girl who belongs to a group whose members indulge in sexual intercourse at an early age is likely to rapidly acquire an insight into the rewards and penalties of sexual indulgence. Nevertheless, even in circumstances where a girl's actual comprehension contradicts the law's presumption, the male is deemed criminally responsible for the act, although himself young and naive and responding to advances which may have been made to him. [Fn. omitted.]
>
> *People v. Hernandez* (1964), *supra,* 61 C.2d 529, 531, 393 P.2d 673, 674

The statute therefore wholly ignores that teenage sexual intercourse may be solicited or encouraged by members of either sex. Males charged with violation of the statute are

precluded from making any showing as to the relative culpability of the female. The nexus between gender and pregnancy prevention is dubious at best, and the universal attribution of responsibility to the male is arbitrary.

The arbitrariness of the statute's classifications can be demonstrated by consideration of a hypothetical statute where the female, but not the male, is deemed criminally responsible for teenage sexual intercourse. Assuming that females as well as males can be deterred by criminal penalties, there is no reason to believe that the hypothetical statute would be any less effective than the existing statute. Females would recognize the criminal implications of their actions and would be accordingly deterred. Femaleness can therefore be used just as effectively as maleness in discouraging teenage sex.

The fact that only females become pregnant actually enhances this argument. If the threat of pregnancy and social sanctions act as a natural deterrent, the additional criminal sanction proposed would further discourage females from engaging in the offensive activity. Criminal sanctions may actually be more effective if applied solely to females because of this additive deterrent value.

The statute uses the trait of maleness *alone* as a proxy for causation of teenage pregnancy. The use of this trait presumes that the male is universally the aggressor and is solely capable of being deterred. In fact, however, the female may be the instigator or at least an equal partner in the decision to engage in sexual intercourse. Since the gender based classifications of the statute do not comport with reality, the universal attribution of guilt to the male only is arbitrary. Such arbitrary use of sex for legis-

lative classifications is violative of the equal protection clause. *Reed v. Reed* (1971) *supra*, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251.

III

THE STATUTE DOES NOT SERVE IMPORTANT GOVERNMENTAL INTERESTS NOR IS IT SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF ANY GOVERNMENTAL INTERESTS

The only governmental interest asserted to justify the gender based classification of the statute is the prevention of teenage pregnancies. While teenage pregnancies may well be a problem of great importance to the State of California, the statute does very little to combat that problem. The connection between the male gender and the causation of teenage pregnancies cannot be demonstrated to meet constitutional criteria.

In order to withstand this constitutional equal protection challenge, the gender based classifications of the statute "must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Orr v. Orr* (1979) *supra*, 440 U.S. 268, 279, 59 L.Ed. 306, 319, 99 S.Ct. 1102, *Craig v. Boren* (1976) *supra*, 429 U.S. 190, 197, 50 L.Ed.2d 397, 407, 97 S.Ct. 451. The burden is on those defending the discrimination to make out the claimed justification. *Wengler v. Druggists Mutual Ins. Co.* (1980) *supra*, ... U.S. ....., 64 L.Ed.2d 107, 116, ... S.Ct. .....; *Califano v. Goldfarb* (1977) *supra*, 430 U.S. 199, 223, 51 L.Ed.2d 270, 286, 197 S.Ct. 1021 (Ste-

vens, J., concurring); *U.S. v. Hicks* (9th Cir., 4/16/80) *supra,* ..... F.2d. ....., 27 Crim.L.Rptr. 2176.

Assuming, arguendo, that the purpose of the statute is indeed the prevention of teenage pregnancy, the respondents cannot meet their burden of demonstrating that the classifications of the statute "serve important governmental objectives" and are "substantially related to the achievement of those objectives." *Craig v. Boren, supra.* The classifications of the statute are not "substantially related to the achievement" of pregnancy prevention since the statute proscribes male sexual activity irrespective of whether pregnancy can result. The statute's failure to exclude all those who utilize birth control devices and those who are otherwise incapable of procreation from its operation results in a grossly overinclusive classification scheme.

Many females under the age of 18 years are too young to conceive. Yet California argues that the statute prohibits intercourse with such females for the sole reason of pregnancy prevention. Certainly sexual activity with prepubescent minors of both sexes is a proper subject of legislative concern. The reason for such concern, however, is not the prevention of pregnancy since prepubescent females, by definition, are too young to conceive.

The inclusion of those who use birth control devices within operation of the statute was rationalized by the California Supreme Court by stating that the legislature was ". . . reluctant to reply . . . upon the doubtful efficacy of contraceptives and the truth of the inevitable claim of

nonemission . . ."[8] *Michael M., supra,* 613 [Pet. W. Cert. p. A-5, 6]. Therefore, the male who has had a vasectomy violates the statute even though it is impossible for his conduct to result in pregnancy. Similarly, the male member of a responsible teenage couple who has sought and obtained birth control counseling and contraceptive devices is inexorably joined in the same category as one who refuses to accept the responsibility for birth control. Even if the male always solicited sexual intercourse, the equation of maleness with causation of teenage pregnancy is incongruent.

California's contention that the gender based statute serves important governmental interests is impeached by the legislative acts of 37 states[9] which have gender neutral

---

[8]The majority's statement that modern contraceptives are of "doubtful efficacy" ignores reality and demonstrates the strained reasoning necessary to force the pregnancy prevention justification to fit the statute's classifications. As pointed out in the dissent of Justice Mosk, "certain pregnancy prevention devices (e.g., condoms and contraceptive pills) are both efficacious and widely available to 17 year old men and women. The majority's disregard of this well known fact does not make it any less true." *Michael M., supra,* 25 Cal.3d 601, 620 (n.3) [Pet. W. Cert. p. A-17].

[9]Alaska (Alaska Stat. § 11.41.410(a)(3), (a)(4)); Arizona (Ariz. Rev. Stat. Ann. § 13-1405); Arkansas (Ark. Stat. Ann. § 41-1803(1)(c)); Colorado (Colo. Rev. Stat. § 18-3-403(1)(e)); Connecticut (Conn. Gen. Stat. Ann. § 53a-71(a)(1)); Florida (Fla. Stat. Ann. § 794.05); Hawaii (Hawaii Rev. Stat. §§ 707-730(1)(b), 707-731(b)); Illinois (Ill. Ann. Stat. ch. 38 §§ 11-5, 11-6); Indiana (Ind. Code Ann. § 35-42-4-3); Iowa (Iowa Code Ann. §§ 709.3, 709.4); Kansas (Kan. Stat. Ann. § 21-3503); Kentucky (Ky. Rev. Stat. §§ 510.040; 510.050); Maine (Me. Rev. Stat. Ann. tit. 17A, §§ 252,

"statutory rape" laws. Certainly, the prevention of teenage pregnancy is a compelling interest in every state. The high incidence of sexual activity among the nation's minors has been the subject of this court's judicial notice. *Carey v. Population Services International* (1977) 431 U.S. 678, 696, 52 L.Ed.2d 675, 692, 97 S.Ct. 2010. The fact that gender neutral statutes exist in over seventy percent of the states, however, demonstrates that California's gender based statute is not necessary to further the legitimate interests of that state.

Nor is California's concern with the sexual activity of older teenagers shared by her sister states. The facts alleged in the Information (A. 7, 8) do not constitute an

---

254); Maryland (Md. Ann. Code art. 27, §§ 463, 464A); Massachusetts (Mass. Ann. Laws ch. 265 § 23); Michigan (Mich. Stat. Ann. §§ 28.788(2)(1)(a), 28.788(4)(1)(a)); Minnesota (Minn. Stat. Ann. §§ 609.342-609.345); Missouri (Mo. Ann. Stat. § 559.260; Montana (Mont. Rev. Codes Ann. §§ 94-5-501 to 94-5-503); Nebraska, (Neb. Rev. Stat. § 28-408.03(1)(c)); New Hampshire (N.H. Rev. Stat. Ann. §§ 632-A2 to 632-A3); New Jersey (N.J. Rev. Stat. § 2a:138-1); New Mexico (N.M. Stat. Ann. §§ 40A-9-21, 40A-9-23); North Carolina (N.C. Gen. Stat. § 14-28-2(a)(2)); North Dakota (N.D. Cent. Code §§ 12.1-20-03, 12.1-20-05, 12.1-20-07); (Ohio Rev. Code Ann. §§ 2907.02, 2907:04); Pennsylvania (Pa. Cons. Stat. Ann. tit. 18, § 3122); Rhode Island (R.I. Gen. Laws § 11-37-2); South Carolina (S.C. Code § 16-3-655); South Dakota (S.D. Comp. Laws Ann. § 22-22-1); Tennessee (Tenn. Code Ann. §§ 39-3703(3), 39-3705(4)); Utah (Utah Code Ann. §§ 76-5-401, 76-5-402(2); Vermont (Vt. Stat. Ann. tit. 13, § 3252); Washington (Wash. Rev. Code §§ 9A.44.070, .078, .079; West Virginia (W. Va. Code §§ 61-8B-3(3), 61-8B-5(a)(2)); Wisconsin (Wis. Stat. Ann. § 940.225(1)); Wyoming (Wyo. Stat. §§ 6-63.3, 6-63.4).

offense in 42 of the states[10] and the District of Columbia.[11] Only four states,[12] including California, could prosecute Michael under the facts alleged. If Sharon were of "previous chaste character" Michael would be subject to

---

[10]Alabama (Ala. Code tit. 14, § 399); Alaska (Alaska Stat. § 11.15.120); Arkansas (Ark. Stat. §§ 41-1803, 41-1804); Colorado (Colo. Rev. Stat. § 18-3-403); Connecticut (Conn. Gen. Stat. §§ 53a-71); Delaware (Del. Code tit. 11, §§ 761-762(a)); Georgia (Ga. Code § 26-2018); Hawaii (Hawaii Rev. Stat. §§ 707-731(1)(b)); Indiana (Ind. Code § 35-42-4-3); Iowa (Iowa Code §§ 709.3, 709.4); Kansas (Kan. Stat. Ann. § 21-3503; Kentucky (Ky. Rev. Stat. §§ 510.040, .050); Louisiana (La. Rev. Stat. §§ 14.42, 14.80); Maine (Me. Rev. Stat. Ann. tit. 17A, §§ 252, 254); Maryland (Md. Ann. Code art. 27, §§ 463, 464A); Massachusetts (Mass. Gen. Laws ch. 265, § 23); Michigan (Mich. Stat. Ann. §§ 28.788(2)(1)(a), 28.788(4)(1)(a)); Minnesota (Minn. Stat. Ann. §§ 609.342-609.345); Missouri (Mo. Stat. Ann. § 559.260); Montana (Mont. Rev. Code §§ 94-5-501 to 94-5-503); Nebraska (Neb. Rev. Stat. § 28-408.03(1)(c)); Nevada (Nev. Rev. Stat. § 200.365); New Hampshire (N.H. Rev. Stat. §§ 632-A2 to 632-A3); New Jersey (N.J. Rev. Stat. § 2a:138-1); New Mexico (N.M. Stat. Ann. §§ 40A-9-21, 40A-9-23); New York (N.Y. Penal Law § 130.25); North Carolina (N.C. Gen. Stat. § 14-27.2(a)(2)); North Dakota (N.D. Cent. Code §§ 12.1-20-03, 12.1-20-05, 12.1-20-07); Ohio (Ohio Rev. Code Ann. §§ 2907.02, 2907.04); Oregon (Or. Rev. Stat. §§ 163.315, 163.345, 163.415, 163.435); Pennsylvania (Pa. Cons. Stat. tit. 18 § 3122); Rhode Island (R.I. Gen. Laws § 11-37-2); South Carolina (S.C. Code § 16-3-655); South Dakota (S.D. Comp. Laws Ann. § 22-22-1); Tennessee (Tenn. Code. Ann. §§ 39-3703(3), 39-3705(4)); Texas (Tex. Penal Code § 21.09); Utah (Utah Code Ann. §§ 76-5-401, 76-5-402(2)); Vermont (Vt. Stat. Ann. tit. 13 § 1352); Virginia (Va. Code § 18.2-61, -63); Washington (Wash. Rev. Code §§ 9A.44.070, .078, .079); West Virginia (W. Va. Code §§ 61-8B-3(3), 61-8B-5(a)(2); Wyoming (Wyo. Stat. §§ 6-63.3 to 6-63.4).

[11]D.C. Code § 22-2801.

[12]Arizona (Ariz. Rev. Stat. Ann. § 13-1405); California (Cal. Penal Code § 261.5); Idaho (Idaho Code § 18-6101(1)); Illinois (Ill. Rev. Stat. ch. 38, §§ 11-5, 11-6).

prosecution in two additional states.[13] Sharon herself, however, would be subject to prosecution in two states[14] for engaging in consensual intercourse with Michael. Sharon could also be prosecuted in one more state[15] if Michael was of "previous chaste character." The irony of Michael's prosecution is heightened by California Civil Code Section 34.5 which gives both Michael and Sharon a statutory right to obtain birth control devices without parental consent.

The utility of the statute for its asserted purpose is also doubtful because it is rarely invoked. State statistics show that the adult arrest rate for violation of the statute is low and declining:

Year	Arrests
1969	979
1970	848
1971	569
1972	486
1973	466
1974	395
1975	475
1976	336
1977	324
1978	274

Cal. Dept. of Justice, Bureau of Criminal Statistics, Division of Law Enforcement, Criminal Justice Profile (1978), p. 6. The number of juvenile[16] arrests for violation of the

---

[13]Florida (Fla. Stat. §§ 794.011, 794.05); Mississippi (Miss. Code Ann. §§ 97-3-65, 97-3-67).

[14]Arizona (Ariz. Rev. Stat. Ann. § 13-1405); Illinois (Ill. Rev. Stat. ch. 38, §§ 11-5, 11-6).

[15]Florida (Fla. Stat. §§ 794.011, 794.05).

[16]A juvenile is, for arrest purposes, a person under the age of 18. Cal. Welf. & Inst. Code §§ 200, et seq., Cal. Civil Code § 25.

statute is apparently not significant enough to be reported. *Ibid.*, p. 8.

When the low arrest rate is compared with the high incidence of sexual activity among minors, the absurdity of California's position becomes apparent. For example, it has been estimated that nationally 45% of all adolescent females have had sexual intercourse. Sorensen, Adolescent Sexuality in Contemporary America (World Publishing, 1973), p. 122. The average frequency of intercourse for all adolescent non-virgins was reported to be 8.0 times per month. *Ibid.*, p. 124. Applying these statistics to California's 1975 female population for ages 15, 16 and 17, (approximately 840,000[17]), yields the conclusion that California's minor females participated in more than 36,000,000 acts of sexual intercourse in 1975. Yet only 475 arrests are reported for that year. California has therefore arrested a scant .00131% of the culprits. The statute's deterrent value is highly dubious when the chances of apprehension are so infinitesimal.

The low rate of prosecution under the statute is no doubt due, in large part, to the private and consensual nature of teenage sexual contacts. Prosecution under the statute is highly unlikely since the only witnesses are unwilling to report the offense in almost every case. The fact that the crime is so difficult to detect and prosecute further evidences the statute's failure to substantially further its alleged purpose.

---

[17]Population Projection for California Counties 1975-2020 with Age/Sex Detail to 2000, Cal. Dept. of Finance, Sacramento (1977).

California Penal Code Section 261.5 is colossally over-inclusive. The contention that the statute serves important interests is impugned by the fact that arrests for the statute's violation are a rarity and by the fact that only a small minority of the states now utilize the type of gender based classifications characteristic of the statute. Since California cannot meet its burden of showing that the statute serves important governmental objectives and is substantially related to the achievement of those objectives, the statute fails to meet equal protection criteria.

IV

PREVENTION OF TEENAGE PREGNANCIES IS NOT THE PURPOSE OF THE STATUTE

The California Supreme Court has determined that the purpose of the statute challenged is the prevention of teenage pregnancies. *Michael M., supra,* 25 Cal.3d 608, 611-612. [Pet. W. Cert. p. A-2, 5]. This determination is, however, wholly unsupported either by the statute's legislative history or by any judicial interpretation. All evidence concerning the purpose of the statute demonstrates that it exists to protect the virtue of young females. Such a purpose is not sufficient to satisfy the constitutional requirements for gender based legislation.

Although the views of the California Supreme Court should be given "careful consideration," this court must make its own independent determination as to the purposes of the statute when constitutional rights are in issue. *Reitman v. Mulkey* (1971) 387 U.S. 369, 373-374, 18 L.Ed.2d 830, 834, 87 S.Ct. 1627, *McGowan v. Maryland* (1961) 366 U.S. 420, 449, 6 L.Ed.2d 393, 413, 81 S.Ct. 1101.

The history and prehistory of the statute[18] are succinctly set forth in the dissent of Justice Mosk. *Michael M., supra,* 25 Cal.3d 608, 617-618 [Pet. W. Cert. p. A-12, 13].[19] At the statute's inception in 1850, sexual intercourse was prohibited with females under the age of 10. *Ibid.* Since the age of puberty is much higher than nine, it is apparent that pregnancy prevention could not have motivated the statute's enactment at its outset.

Between 1889 and 1913 the age of consent was raised incrementally to age 18. *Ibid.* Although the legislative history is silent as to the motivation of California's lawmakers in advancing the age, the California courts were outspoken in proclaiming the statute's purpose as the protection of female virtue. See *People v. Verdegreen* (1895) *supra,* 106 Cal. 211, 214, 39 P. 607 (protection from violation of "the virtue of young and unsophisticated girls"); *People v. Lourintz* (1896) 114 Cal. 682, 630, 46 P. 613, (same); *People v. Ratz* (1896) 115 Cal. 132, 135, 46 P. 915, 916 (purpose "obvious" but "crime too infamous to bear discussion"); *People v. Edwards* (1912) 163 Cal. 752, 757, 127 P. 58 (female "incapable of giving legal consent because of tender years"); *People v. Courtney* (1960) 180 Cal.App.2d 61 (purpose is "to protect young girls from illicit intercourse"—applied to married minor female); *People v. Hernandez* (1964), *supra,* 61 Cal.2d 529, 531, 393 P.2d 673 (female "too innocent and naive to understand the implications and nature of her act"); *People v. Cald-*

---

[18]The statute was originally codified as subdivision 1 of California Penal Code Section 261. In 1970, it was recodified in its present form. Cal. Stats. 1970, ch. 1301, § 2, p. 2406.

[19]See also *Statutory Rape Laws, supra,* n.2 [Manuscript p. 6-8].

well (1967) 255 Cal.App.2d 229, 230 (protection from illicit sexual intercourse—applied to married minor female); *People v. Mackey* (1975) *supra*, 46 Cal.App.3d 755, 760 (females more likely "to be the objects of desires and designs of older people"). Throughout the 130 year history of the statute, prevention of pregnancy has never been mentioned by a California court as a purpose for the statute. The assertion that pregnancy prevention is the purpose of the statute is therefore wholly without historical support.

The application of the statute itself is far broader than necessary to simply prevent pregnancy.[20] The failure to exclude prepubescent females and couples who use reliable birth control devices evidences an intent to forbid the act of sexual intercourse itself. The proscription of acts which do not result in pregnancy demonstrates that the statute has a broader purpose—the wholesale prohibition of sex with young women.

The California Supreme Court's bald assertion as to the purposes of this gender based statute should not be accepted as a matter of course. This court should be especially wary when the child bearing capacity of women is used to justify a disparity in the treatment of the sexes:

> Certainly the fact that women and not men bear children is a fundamental distinguishing characteristic of the two sexes and as such it can be the basis for some gender based legislation; but there is a danger that the very uniqueness of this characteristic

---

[20]See *supra*, pp. 18-19.

> makes it an available hindsight catchall rationalization for laws that were promulgated with totally different purposes in mind.
>
> *Meloon v. Helgemoe, supra,* (1st Cir. 1977) 564 F.2d 602, 607

In view of the overbreadth of the statute and the total lack of historical evidence supporting the asserted purpose, California's pregnancy prevention rationale must be considered a "hindsight catchall rationalization" which should not be accepted as a justification for the statute.

CONCLUSION

On the basis of the foregoing, the judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

GREGORY F. JILKA
TERESA DE LA O
Attorneys for Petitioner

APPENDIX

Appendix

Constitutional and Statutory Provisions Involved

California Penal Code § 261.5:

Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.

California Penal Code § 264 (effective until January 1, 1980):

Rape, as defined in Section 261, is punishable by imprisonment in the state prison for three, six, or eight years. *Unlawful sexual intercourse, as defined in Section 261.5, is punishable either by imprisonment in the county jail for not more than one year or in the state prison,* and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison, provided, that when the defendant pleads guilty to an offense under Section 261.5, the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison. (emphasis supplied)

California Penal Code § 264 (operative January 1, 1980):

Rape, as defined in Section 261, is punishable by imprisonment in the state prison for three, six, or eight years. Rape as defined in Section 262, is punishable either by imprisonment in the county jail for not more than one year or in the state prison for three, six, or eight years. *Unlawful sexual intercourse, as defined in Section 261.5, is punishable either by imprisonment in the county jail for not more than one year or in the state prison,* and in

such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison; provided, that when the defendant pleads guilty to an offense under Section 261.5 the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison. (emphasis supplied)

California Penal Code § 18:

Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony, or to be punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons for 16 months, or two or three years; provided, however, every offense which is prescribed by any law of the state to be a felony punishable by imprisonment in any of the state prisons or by a fine, but without an alternate sentence to the county jail, may be punishable by imprisonment in the county jail not exceeding one year or by a fine, or by both.

Section 1 of the Fourteenth Amendment of the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.